PD-0723-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/15/2019 3:43 PM
Accepted 2/19/2019 10:37 AM
DEANA WILLIAMSON
CLERK

NO. PD-0723-18

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/19/2019
DEANA WILLIAMSON, CLERK

LAURA CARSNER **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S BRIEF ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-11-00326-CR,
TRIAL COURT CAUSE NUMBER 20090D05416,
171st DISTRICT COURT OF EL PASO, TEXAS

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The State requests oral argument.

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STATEMENT OF THE CASE

Following her conviction for the capital murder of her mother, Irma Quiroz (hereinafter Irma), and her stepfather, Javier Alejandro Quiroz (hereinafter Javier), for which she received an automatic life sentence, (CR4:1193, 1197-99, 1218-20, 1247-49); (RR10:122-23); (RR11:6),[1] Laura Carsner, appellant, filed a motion for new trial, which the trial court, after hearing evidence and arguments, denied without written findings. (CR4:1208-16, 1254); (RR14:4-5, 7-9). On October 9, 2013, the Eighth Court of Appeals, holding that Carsner had satisfied the four requirements for a new trial based on newly discovered evidence, as set out by this Court in *Keeter v. State*, 74 S.W.3d 31 (Tex.Crim.App. 2002), reversed her conviction and remanded the case for a new trial. *See Carsner v. State*, 415 S.W.3d 507 (Tex.App.–El Paso 2013), *vacated*, 444 S.W.3d 1 (Tex.Crim.App. 2014).

This Court subsequently vacated the Eighth Court's judgment for failing to address the State's arguments that the first two *Keeter* requirements–requiring

[1] Throughout this brief, references to the record will be made as follows: references to the clerk's record will be made as "CR" and volume and page number; references to the first supplemental clerk's record, filed in the Eighth Court of Appeals on November 15, 2011, will be made as "1SCR" and page number; references to the second supplemental clerk's record, filed in the Eighth Court on November 30, 2011, will be made as "2SCR" and page number; references to the twenty-seven volume reporter's record will be made as "RR" and volume and page number; and references to exhibits will be made as either "SX" or "DX" and exhibit number.

Carsner to show that: (1) the newly discovered evidence was unknown or unavailable to her at trial, and (2) her failure to discover or obtain that evidence was not due to her lack of due diligence–had not been met. *See Carsner*, 444 S.W.3d at 4. On remand, the Eighth Court affirmed Carsner's conviction, holding that she had not satisfied either of the first two *Keeter* requirements. *See Carsner v. State*, No. 08-11-00326-CR, 2018 WL 2998194 at *4-7 (Tex.App.–El Paso, June 15, 2018, pet. granted) (not designated for publication).[2]

This Court granted Carsner's PDR on the following two grounds: (1) "Whether, as a matter of law, evidence that has been forgotten by a defendant is unknown, for purposes of the newly-discovered-evidence rule, only if the defendant forgot about it because of a physical or mental condition, such as amnesia or repression, that was caused by a traumatic event, debilitating injury, or disease, the existence of which can be confirmed by science or medicine;" and (2) "Whether, as a matter of law, a defendant who fails to recall evidence, once known but since forgotten, has not, for the purposes of the newly discovered evidence rule, exercised diligence to discover or obtain that evidence."

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[2] On remand, the Eighth Court did not address whether Carsner had satisfied the third and fourth *Keeter* requirements, that is, whether the new evidence was admissible and not merely cumulative, corroborating, collateral, or impeaching and whether the new evidence was probably true and would probably bring about a different result in a new trial. *See Carsner*, 2018 WL 2018 WL 2998194 at *4-7.

STATEMENT OF FACTS

On August 28, 2009, Carsner, having been embroiled in CPS (Child Protective Services) proceedings to regain custody of her daughter, A.C., attended a family-court hearing addressing her request that Irma and Javier not have weekend visitation with A.C. (RR7:69-73). Irma and Javier had reported Carsner to CPS, and A.C. was removed from Carsner's custody on the basis of her ongoing alcohol abuse and neglect of A.C. (RR6:57-60); (RR7:106-07). In a telephone conversation the following day, August 29, 2009, Carsner, frustrated and upset, told a friend, Claudia Sprowso, that Irma had been awarded custody of A.C., which Carsner acknowledged at trial was not true. (RR5:151-52, 165); (RR7:70-73).

On that same date, at approximately 11:22 a.m., Carsner completed the purchase of handgun she had attempted to buy several days before. (RR4:72-77). Before driving over to her parents' home, Carsner stopped in a desert area for target practice. (RR7:77). When Carsner arrived at the Quirozes' home, she parked two houses down, despite ample parking space in front of their home, and walked, unannounced, through a side gate and into their backyard where they were barbequing for their grandchildren, nine-year-old A.Q., six-year-old J.Q., and eight-year-old A.C. (RR3:30-35, 53-56); (RR5:62-65, 98-101); (RR9:49-51).

Dressed all in black, hiding her hands behind her back, and wearing an "evil grin," Carsner advanced on her parents, and, as the children began to flee, Carsner, without saying a word, opened fire on her parents. (RR5:65-72, 81-83, 92-93, 100-02); (RR9:51-54). As J.Q. was trying to flee, he heard Javier say, "Shoo," and heard Irma begging Carsner not to shoot her. (RR5:115-17). Carsner shot Javier four times, with one gunshot wound to his back from a distance of two inches, and Irma eight times, with one gunshot wound to her head from a distance of eight to ten inches, killing them both. (RR5:25-27, 41-43).

Carsner then fled the scene and, despite her claim that she had gone to the Quirozes' residence to get A.C., drove in the opposite direction of where A.C. would likely have run. (RR5:86-89); (RR7:81-83). Approximately 10 minutes after Sprowso had spoken to Carsner about what transpired at the CPS hearing, Carsner called Sprowso and told her that she had shot her parents, prompting Sprowso to call 911. (RR5:152-53). On the recording of the 911 call, which was published to the jury, Sprowso related that Carsner had told her that Irma had been awarded custody of A.C.; that "...it was a very bad place for her daughter to go but the Judge wasn't hearing that, and so she was going to eliminate the situation;" and that she had shot her parents. (RR5:133-36).

When El Paso County Sheriff's deputies, who were dispatched regarding a possibly intoxicated person, first encountered Carsner sitting on the curb outside the residence of an individual Carsner had met at an Alcoholics Anonymous meeting, Carsner said nothing while drinking an alcoholic beverage. (RR3:62-64, 67, 73, 113-15). After the deputies sat her down in one of their patrol cars and inquired into her welfare, Carsner shrugged her shoulders and stated that she had just shot her parents. (RR3:67-68, 76-77).

Although defense counsel generally asserted during Carsner's opening statement at trial that she had lacked the intent to shoot and kill her parents, defense counsel's stated purpose for presenting evidence that Javier was a "pedophile" who had molested Carsner was to demonstrate *why* she had shot Javier and Irma, that is, her motive for shooting them:

> ...all you've heard is that...[Carsner] shot Javier and Irma..., but you haven't heard *why*. They haven't told you *why*. They don't want you to know *why*, but we are going to tell you exactly *why*. (RR5:124-30) (emphasis added).

* * *

> You do not know *why* and are [sic] going to tell you *why*. It's because of the *reasons*...is why [Carsner] is innocent of capital murder." (RR5:127).

* * *

> This case is more about [sic] a simple homicide. It's a story about a mother who did everything necessary to prevent her daughter from an apparent, immediate threat and she had to protect her. (RR5:130).

At trial, Carsner claimed she had been molested by four different men throughout her childhood, specifically, her grandmother's boyfriend, Javier, an uncle, and her oldest brother. (RR6:16-18, 21, 114). On cross-examination, the State pointed out inconsistencies in Carsner's testimony about the alleged sexual abuse by her oldest brother, Rene Carsner. (RR7:38-44); *see also* (RR6:21, 114).

The State also presented evidence to refute Carsner's claim that Javier had sexually abused her, specifically: (1) Carsner's testimony that during an approximate two-week period between the time Carsner had been kicked out of her parents' home and the time CPS became involved, A.C. had been living in the Quiroz home unsupervised, (RR7:107-08, 127); (2) Sprowso's testimony that Carsner had left A.C. with Irma and Javier, without supervision, on a number of occasions, (RR5:161-62); (3) family photographs depicting Carsner being affectionate and spending time with Javier, Irma, and Rene, (RR7:137-42, 149-50); (SX148-154, 157-158); (4) a birthday card that Carsner sent to Javier, in which she happily recalled the first time he was introduced into their family and expressed affection and gratitude for his role in her life, (RR7:145-48); (SX155-156); (5) Rene's testimony that he never saw Javier or Irma abuse Carsner in any

way, that Carsner was not a truthful person, and that she would frequently lie or exaggerate her stories, (RR9:29-30, 33-34); and (6) A.C.'s testimony that she had stayed with Irma and Javier while Carsner was not there, that Javier had never touched any of her private parts, and that Carsner was not a truthful person. (RR9:46-48, 59, 61).

Additionally, the State presented evidence that Carsner, when angered, had falsely accused, or threatened to falsely accuse, numerous individuals of abusing either her or A.C., specifically: (1) Carsner's testimony that when Carsner ended her relationship with one of her romantic partners, Mary Ann Mayham, she (Carsner) accused Mayham of molesting A.C. and threatened to report her to the police; (2) Rene's testimony that up until the day of the murders, he had had no problems in his relationship with Carsner, that Carsner would visit him and his family, and that she had designated him to CPS as a possible placement for A.C., (RR9:22-28, 34); (SX160); and (3) the testimony of one of A.C.'s foster parents at the August 28, 2009, CPS hearing, in which he (the foster parent) testified that Carsner threatened to have his twelve-year-old son tried as an adult and

imprisoned for molesting A.C. (RR7:110-11); (SX142 at 124, 127, 133); (SX144 at 56-57).[3]

Another false allegation that Carsner persisted in making an issue of, even though she knew the allegation to be false, involved the alleged "rape" of then-six-year-old A.C. by a cousin that visited the Quiroz residence. (RR6:145-46). Carsner acknowledged at trial that this alleged "rape" was an incident involving A.C.'s then-four-year-old cousin J.Q. where he had put his hand on her private area, and A.C. in turn squeezed J.Q.'s testicles so hard that he cried, and that it was determined, after an investigation, that there had been no sexual assault. (RR7:57-69); (SX142 at 153-54). Carsner herself believed the incident to be nothing more than playtime between two young children getting a little out of control and agreed that no sexual abuse had occurred. (RR7:68-69).

When asked at trial whether she had intended on killing her parents when she went to their home, Carsner stated that she had not and that she had gone to their home to get A.C. to take her to the hospital to be examined or to the police. (RR7:20, 154). Carsner testified that when she told Irma and Javier that she had come to get A.C., Irma and Javier "came at her," and the "gun went off."

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[3] With respect to State's Exhibit 142 and 144, the State will use the bate-stamp numbers on the record for its pinpoint citations.

(RR7:22-23). Carsner testified that she did not remember pointing the gun at Javier, that she did not remember how many times she fired the gun, and that she was not trying to kill her parents. (RR7:23).

Dr. Arthur Ramirez, one of Carsner's mental-health experts, opined that Carsner suffered from post-traumatic-stress disorder (PTSD) as a result of her alleged physical and sexual abuse. (RR8:8). Dr. Ramirez further opined that after the August 28, 2009, CPS hearing, Carsner "...experienced a lot of fear and anxiety that her daughter would be harmed sexually..." and that "[b]ecause of that state, her intent was to go retrieve her daughter, take her to a hospital, and have a medical examination of her daughter." (RR8:11-12). Dr. Ramirez also testified that Carsner claimed that shortly before the murder of her parents, she began experiencing flashbacks of Javier sexually abusing her. (RR8:12, 15). On cross-examination, Dr. Ramirez acknowledged that a person suffering from PTSD would still understand the difference between right and wrong. (RR8:28).

Dr. James Schutte, another defense expert, opined that Carsner had a mood disturbance when depressed, irritable, or angry; that she had an anxiety condition in which she experienced insomnia, obsessive thoughts about sexual abuse, and concern for A.C. being sexually abused; and that she had a history of alcoholism. (RR9:80-81). Dr. Schutte opined that on the day of the murders, Carsner

understood the difference between right and wrong. (RR9:87, 89). In his report, Dr. Schutte opined that Carsner's "...abuse history and mental illness contributed to her behavior in the incident in question." (DX8).

During closing arguments, defense counsel argued that the State had failed its burden of proving that Carsner intentionally or knowingly killed her parents because the evidence demonstrated that due to the indifference and incompetence of CPS in handling A.C.'s case, Carsner felt that she had to go to her parents' home to retrieve A.C. and take her to the hospital or to the police. (RR10 at 22-23, 32, 39-44, 46-48, 53-54, 58-62, 65).[4]

After her conviction, Carsner filed a motion for new trial based on newly discovered evidence, arguing that the testimony of Henry O'Hara, an individual Carsner dated in high school in 1979[5] and to whom Carsner allegedly made a sexual-abuse outcry, would have corroborated her story that she reasonably feared that, because Javier had molested her when she was a child, he would molest A.C. too. (CR4:1208-16); (RR12:11-12). O'Hara testified at the new-trial hearing that

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[4] During closing argument, defense counsel also argued, "You heard what both Dr. Ramirez and Dr. Schutte testified to, about her state of mind, there was absolutely not [sic] intent by [Carsner]." (RR10:58). Defense counsel's argument was not supported by the record, as neither expert ever testified that Carsner lacked the intent to commit murder.

[5] O'Hara and Carsner rekindled their friendship at some point during 1999 to 2001. (RR12:13-17).

he became aware of Carsner's case after reading about her conviction in the newspaper. (RR12:17-18). In discussing their prior relationship, O'Hara testified that when he became upset that their relationship "...wouldn't get physical," Carsner explained to him why she could not. (RR12:12-13). O'Hara related that Carsner told him that her abuser hung her upside down in the bathroom, smeared hamburger meat all over her, and licked it off, although O'Hara could not remember whether Carsner had identified the abuser as Javier or her grandfather. (RR12:13, 34-35). O'Hara later testified that he did not "...remember exactly what point in her life [Carsner] was molested," acknowledging that, before the hearing, he had told a detective that it had been when Carsner was "smaller." (RR12:134-38).

Carsner testified at the new-trial hearing that while she did not remember telling O'Hara that she had been sexually abused, she remembered O'Hara, how she met O'Hara, how he dressed, that "the situation with [O'Hara] was an experience for [her]," and that she "...had to explain to him why [she] couldn't" be "physical" with him. (RR12:63-65). She testified that she had told her trial counsel about her history of sexual abuse, but did not tell him about O'Hara because she did not remember confiding in him about any sexual abuse, (RR12:64-65), even though Carsner recalled that the alleged abuse by Javier

would have been occurring around the time she was dating O'Hara. (RR12:70-71).

At the hearing, Carsner's trial counsel testified that he interviewed Carsner extensively about the sexual abuse and whether she could provide the names of anyone who could corroborate her outcry against Javier and that, although he believed that she had given him some names, she did not identify O'Hara. (RR12:79-82, 89-90, 96-99, 104-05, 110-11). Carsner's trial counsel opined that O'Hara's testimony would have been valuable to Carsner's defensive theory that she did not go to her parents' home with the intent to murder them, but only went to take her daughter to the police or to the hospital. (RR12:77-79, 85-86, 90, 92-93). On cross-examination, however, trial counsel acknowledged that he had seen the statement of Carsner's former romantic partner, Mayham, in which Mayham mentioned the hamburger-meat incident but identified a person other than Javier as the perpetrator. (RR12:102-03, 105, 119). Trial counsel testified that he went over Mayham's statement with Carsner, who pointed out alleged inconsistencies. (RR12:102).

At the new-trial hearing, the State presented the testimony of Laura Ponce, an old friend of Carsner, who testified that, in confiding to her about her alleged childhood sexual abuse, Carsner told her that Carsner's grandmother's husband

had hung her in the bathroom when she was very young and that she (Ponce) was absolutely certain that Carsner identified her grandmother's husband because she and Carsner had planned to drive to Juarez, Mexico, to find this individual's home. (RR12:124-27, 129-30). Mayham also testified, relating that in approximately 2008, Carsner had confided to her about her alleged childhood sexual abuse and similarly told her that it was a family friend, and not Javier, who had hung her in the bathroom, smeared hamburger meat on her, and licked it off. (RR12:141-43, 146-47, 150-52).[6]

During argument at the new-trial hearing, the State disputed whether Carsner had previously identified her stepfather to O'Hara as her abuser, arguing specifically that: "...it is probably likely that Mr. O'Hara is incorrect.... He can't remember and told the Court, under oath, I can't remember who she said did this." (RR12:181-82).

In denying Carsner's new-trial motion, the trial court concluded on the record that Carsner had satisfied the first two *Keeter* prongs, but not the third, and declined to address the fourth prong. (RR14:4-5). Specifically, the trial court stated:

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[6] Mayham also testified that Carsner told her that she had been happy when Javier became a part of their family because it ended the abuse by this family friend. (RR12:142-43, 151).

> ...it was my opinion – my humble opinion that you were okay on prong one. You were with prong two. It was prong three that you could not and did not overcome which was that it could not just be merely corroborative. And so that;s [sic] prong [sic] that I think you did not meet, so as I told you off the record, I am telling you on the record, I did not fully explore prong number four. So I guess my findings are going to reflect that.

(RR14:5). The trial court issued a written order denying Carsner's new-trial motion, but did not issue written findings of fact. (CR:1254); (RR14:7-9).

SUMMARY OF THE STATE'S ARGUMENTS

Summary of the State's reply to Carsner's first ground: The issue Carsner presented in the courts below was whether the law would recognize as "unknown" evidence that was undoubtedly known to her at one point in time, simply because she forgot about it at the time of trial–a mixed question of law and fact for which any historical findings by the trial court were not dispositive. Because Carsner, as the source of the information and an active participant in her own alleged outcry to O'Hara, was necessarily privy to what she said and to whom, O'Hara's existence as a witness to corroborate Carsner's own statements cannot, by necessity and as a matter of law, constitute evidence that was unknown to her. And Carsner's claimed excuse that she just forgot about what she herself said to O'Hara, particularly where Carsner presented no evidence of *permanent* memory loss and could potentially remember her alleged outcry at any time–just as any other person might suddenly recall that which they could not remember 5 minutes ago–such that her statements were known to her after all, did not transform the complained-of evidence into evidence that Carsner learned about for the first time after trial. Thus, the Eighth Court did not err in holding that O'Hara's testimony was not newly discovered evidence that was unknown to Carsner at the time of her trial.

Summary of the State's reply to Carsner's second ground: Because merely forgetting a witness does not excuse the lack of diligence in obtaining that witness's testimony, Carsner failed to show that O'Hara's testimony could not have been found with the exercise of diligence. But even if Carsner could demonstrate that her specific statements to O'Hara were unknown to her because she just forgot about them, she still failed to show that O'Hara's testimony about her statements could not have been obtained with the exercise of reasonable diligence because the State presented evidence tending to show that Carsner had confided her alleged childhood sexual abuse to friends, family members, and romantic partners, and the fact that she had confided in such individuals should have placed the defense on notice that she might have shared such details with other individuals with whom she shared similarly close relationships, like O'Hara, a former boyfriend, who she remembered very well. Carsner's failure to advise trial counsel of O'Hara's existence as a potential witness, even though trial counsel questioned her about the existence of such potential witnesses, thus demonstrated a lack of diligence, even if Carsner could not recall the specific statements she made to O'Hara.

Additionally, the trial court's denial of Carsner's new-trial motion, which is the ultimate ruling she challenges, should be upheld because, in light of all the

evidence, O'Hara's testimony, even if true, was not sufficiently compelling to probably bring about a different result in a new trial.

STATE'S REPLIES TO APPELLANT'S GROUNDS PRESENTED

REPLY TO GROUND ONE: Evidence to which a defendant was privy, particularly if the defendant was the source of the evidence, is necessarily known to the defendant. And evidence for which the defendant had personal knowledge, but has forgotten, is not unknown to her for purposes of obtaining a new trial. Consequently, O'Hara's testimony about what Carsner herself had told him was not newly discovered evidence that was unknown to Carsner at the time of her trial simply because she claimed to have forgotten that she told him about it.

UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

ARGUMENT AND AUTHORITIES

In her first ground accepted for review, Carsner asserts that, for purposes of a new-trial motion based on newly discovered evidence, the question of whether new evidence was unknown to a defendant prior to trial is purely a credibility-based fact question, the determination of which is entitled to almost total deference on appeal. *See* (Appellant's brief at 6). Carsner further asserts that the Eighth Court thus erred when it deferred to an implied finding by the trial court that Carsner's testimony that she forgot what she told O'Hara was credible, but nevertheless held that evidence Carsner once knew was not rendered "unknown" and "newly discovered" to her merely because she subsequently forgot about it,

particularly where she presented no evidence that her forgetfulness stemmed from amnesia or a physical ailment that prevented her from recalling the complained-of evidence before trial. *See* (Appellant's brief at vi, 5-6).

I. General standard of review and applicable law for motions for new trial based on newly discovered evidence

A trial court's ruling on a motion for new trial is reviewed for an abuse of discretion. *See State v. Herndon*, 215 S.W.3d 901, 906 (Tex.Crim.App. 2007). Before a defendant is entitled to a new trial based on newly discovered or newly available evidence, the following four-prong test must be satisfied by the defendant: (1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial; (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring about a different result in a new trial. *See Carsner*, 444 S.W.3d at 2-3, *citing Wallace v. State*, 106 S.W.3d 103, 108 (Tex.Crim.App. 2003); *Keeter*, 74 S.W.3d at 36-37; *see also* TEX. CRIM. PROC. CODE art. 40.001 (providing for a new trial where "...material evidence favorable to the accused has been discovered since trial").

Motions for new trial based on newly discovered evidence traditionally lack favor with the courts and should be viewed with great caution. *See Drew v. State*, 743 S.W.2d 207, 225 (Tex.Crim.App. 1987); *Villarreal v. State*, 79 S.W.3d 806, 813 (Tex.App.–Corpus Christi 2002, pet. ref'd). The credibility of the witnesses and the probable truth of the new evidence are matters to be determined by the trial court. *See Keeter*, 74 S.W.3d at 37; *Etter v. State*, 679 S.W.2d 511, 515 (Tex.Crim.App. 1984).

The trial court, making the conclusory statements on the record that Carsner had satisfied the first two *Keeter* prongs, but not the third, did not articulate the factual bases for these conclusions or issue written fact findings. (CR:1254); (RR14:4-9). Where, as here, the trial court does not make express findings of fact, the reviewing court should view the evidence in the light most favorable to the trial court's ruling and should assume that the trial court made implicit findings of fact that support its ruling so long as those findings are supported by the record. *See Johnson v. State*, 414 S.W.3d 184, 192-93 (Tex.Crim.App. 2013); *Lujan v. State*, 331 S.W.3d 768, 771 (Tex.Crim.App. 2011).

II. The question of whether evidence is "unknown" for purposes of a new-trial motion is a mixed question of law and fact that does not inherently turn on an evaluation of credibility and demeanor.

This Court has explained that the proper standard of review as to a particular issue depends upon the type of question presented to the reviewing court. *See Loserth v. State*, 963 S.W.2d 770, 772 (Tex.Crim.App. 1998). And this Court identified three types of questions in *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997):

> (1) historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor;
>
> (2) application-of-law-to-fact questions, also known as mixed questions of law and fact, if the ultimate resolution of those questions turns on an evaluation of credibility and demeanor; and
>
> (3) mixed questions of law and fact that do not fall within the second category. *See Loserth*, 963 S.W.2d at 772.

When faced with an issue of mixed law and fact, the critical question under *Guzman* is whether it "turns" on an evaluation of credibility and demeanor. *See Loserth*, 963 S.W.2d at 772. A trial court's ruling on a mixed question of law and fact will often depend in large part on how the trial court assesses the demeanor and credibility of certain witnesses. *See id*. But the fact that credibility and demeanor are facts, even important facts, in the trial court's assessment does not necessarily mean that the mixed question falls within the second *Guzman*

category. *See id*. This Court has explained that "...a question 'turns' on an evaluation of credibility and demeanor 'when the testimony of one or more witnesses, if believed, is *always* enough to add up to what is needed to decide the substantive issue.'" *See Abney v. State*, 394 S.W.3d 542, 547 (Tex.Crim.App. 2013), *quoting Loserth*, 963 S.W.3d at 773 (emphasis in original).[7]

Contrary to Carsner's assertions, it is not apparent from the alibi cases upon which the Eighth Court relied in its opinion that "...the appellate court [in those cases] found as a matter of fact, or sustained the factual finding of a trial court, that the defendant was not entitled to a new trial because he was actually aware before trial of the evidence he claimed to be newly discovered." *See* (Appellant's brief at 11-16), *citing Drew v. State*, 743 S.W.2d 207 (Tex.Crim.App. 1987); *Baker v. State*, 504 S.W.2d 872 (Tex.Crim.App. 1974); *Villarreal v. State*, 79 S.W.3d 806 (Tex.App.–Corpus Christi 2002, pet. ref'd); *Martinez v. State*, 824

[7] In distinguishing what might constitute a fact determination as opposed to a legal conclusion, the following definition of "fact" from Black's Law Dictionary is instructive: "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." *See* BLACK'S LAW DICTIONARY 610 (7th ed. 1999); *cf. Ex parte Medellin*, 223 S.W.3d 315, 350 (Tex.Crim.App. 2006), *aff'd*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) (relying on the definition of "fact" from Black's Law Dictionary in explaining the distinction between factual and legal bases for habeas-corpus writ claims). "It is the application of the law to a fact or set of facts that yields the legal effect, consequence, or interpretation." *See Ex parte Medellin*, 223 S.W.3d at 350.

S.W.2d 688 (Tex.App.–El Paso 1992, pet. ref'd); *Seals v. State*, 634 S.W.2d 899 (Tex.App.–San Antonio 1982, no pet.).

At the outset, appellate courts are not first-level fact-finders, *see Russo v. State*, 228 S.W.3d 779, 791 (Tex.App.–Austin 2007, pet. ref'd) ("Reviewing courts are not fact finders."), and, outside the context of an article 11.07 post-conviction writ application, neither is this Court. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex.Crim.App. 2008); *Guzman*, 955 S.W.2d at 89 (explaining that this Court may exercise its discretion to review *de novo* decisions by the intermediate appellate courts). And examination of the aforementioned alibi cases reflects that the courts' holdings that the evidence to which a defendant is privy is known to that defendant were not predicated on any deference to a lower court's factual findings. *See Drew*, 743 S.W.2d at 226-27 (upholding the denial of defendant's new-trial motion without an evidentiary hearing based partly where the defendant's new evidence–his alleged non-participation in the offense–was necessarily known to him at the time of trial); *Baker*, 504 S.W.2d at 875; *Villarreal*, 79 S.W.3d at 814; *Martinez*, 824 S.W.2d at 692; *Seals*, 634 S.W.2d at 907-08. That those courts held that such evidence is necessarily known to the defendant, notwithstanding the defendant's assertions to the contrary, thus reflects that the question of whether evidence is unknown to the defendant is a mixed

question of law and fact that does not turn on a trial court's evaluation of credibility and demeanor. *See*, *e.g.*, *Abney*, 394 S.W.3d at 547; *Loserth*, 963 S.W.3d at 772-73.

And whether the alleged new evidence was unknown to Carsner as a matter of fact was not quite the issue she presented in the courts below. Given that Carsner was the one who made the alleged outcry to O'Hara, the undisputed evidence is that, at the very least, that evidence was in fact known and available to her at some point prior to trial, such that it was not evidence that she discovered for the first time after trial.[8] Carsner could not have forgotten the evidence, as she now contends, if she never knew it in the first place. Rather, the issue Carsner presented in the courts below was whether the law would nevertheless recognize as "unknown" evidence that was undoubtedly known and available to her at one point in time, simply because she just forgot about it at the time of trial–a mixed question of fact and law for which any historical findings by the trial court that Carsner had in fact made some sexual-abuse outcry to O'Hara and forgot about it at the time of trial were not dispositive.

[8] By arguing that Carsner would have known about evidence she created before trial, the State is in no way conceding to the veracity of any witness's assertion that Carsner actually made a sexual-abuse outcry about Javier before CPS proceedings were initiated against her.

For the following reasons, the law does not recognize as "unknown" evidence that the defendant once knew, but just forgot about at the time of trial.[9]

III. O'Hara's testimony was not newly discovered evidence that was unknown to Carsner at the time of her trial.

A. Evidence to which a defendant was privy, particularly if the defendant was the source of the evidence, is necessarily known to the defendant.

Contrary to Carsner's assertions, the Eighth Court did not hold, based on the aforementioned alibi cases, that the presence of an alibi witness can *never* be unknown, as a matter of law. *See* (Appellant's brief at 11-16). Rather, the Eighth Court simply explained that those cases lent analogous support for the unremarkable and common-sense proposition that when the objective facts demonstrate that the defendant had once been privy to the alleged new evidence, particularly if the defendant was the source of the evidence, that evidence cannot be considered newly discovered. *See Carsner*, 2018 WL 2998194 at *5 (agreeing that the cited alibi cases lent analogous support for the State's contention that "...regardless of who remembers an incident, the premise remains the same–evidence to which a defendant is privy, particularly when the defendant is

[9] For the same following reasons, even if the question of whether once-known-but-later-merely-forgotten evidence is unknown to a defendant was a fact question, a trial court's finding that such evidence was unknown to the defendant would be a finding unsupported by the objective facts in the record and thus entitled to no deference on appeal.

the source of that evidence, cannot be considered newly-discovered evidence"). In fact, the Eighth Court expressly acknowledged that the rationale in the aforementioned alibi cases would not apply where "...a witness comes forward after trial that was *not* within the defendant's knowledge at the time of trial," that is, where the defendant never knew about the existence of the evidence until after trial. *See Carsner*, 2018 WL 2998194 at *7.

As a general proposition, the courts of this State have routinely held that, in those situations where it is apparent that the defendant knew about the complained-of evidence, that evidence cannot, by necessity, be unknown to the defendant. *See*, *e.g.*, *Drew*, 743 S.W.2d at 227 (holding that the co-defendant's affidavit that, although present, the defendant did not participate in the offense, was not newly discovered or newly available evidence where the defendant necessarily knew about his alleged non-participation in the offense and the affidavit "...did not address relevant facts to which the [defendant] was not privy"); *Baker*, 504 S.W.2d at 875 (holding that since appellant must have known prior to trial where he was, what he was doing, and who he was with at the time of the offense, his alleged new alibi evidence was not newly discovered); *Villarreal*, 79 S.W.3d at 814 (holding that the complained-of new alibi evidence was not unknown to the defendant where his own evidence showed that he knew of the

existence of the alibi witnesses prior to trial); *Thomas v. State*, 31 S.W.3d 422, 428 (Tex.App.–Fort Worth 2000, pet. ref'd) (holding that the defendant's own statement to law-enforcement officers that another inmate was soliciting inmates at the jail to murder the complainant was evidence that was known to him, such that it was not newly discovered); *Seals*, 634 S.W.2d at 908 (holding that appellant must necessarily have known of the existence of alibi witnesses who were with him at the time of the offense and that such evidence might have been newly obtained, but not newly discovered).

Putting aside for the moment Carsner's claimed excuse for later "unknowing" what she once knew regarding the alleged outcry, Carsner surely cannot dispute the fact that she knew about her alleged outcry to O'Hara at the time that she made it. Because Carsner, as the source of the information and an active participant in her own alleged outcry, was necessarily privy to what she said and to whom, O'Hara's existence as a potential witness to corroborate her own statements, cannot, by necessity and as a matter of law, constitute evidence that was unknown to her. *See*, *e.g.*, *Drew*, 743 S.W.2d at 227; *Baker*, 504 S.W.2d at 875; *Villarreal*, 79 S.W.3d at 814; *Thomas*, 31 S.W.3d at 428; *Seals*, 634 S.W.2d at 908.

B. Evidence for which the defendant once had personal knowledge, but has forgotten, is not unknown to her.

Even though: (1) article 40.001, by its plain language, applies only where material evidence favorable to a defendant "...has been discovered *since trial*," *see* TEX. CRIM. PROC. CODE art. 40.001; (2) Carsner would not be learning, for the first time after trial, about statements she allegedly made to O'Hara before trial; and (3) Carsner has never before alleged, much less proven, that she suffered "...actual memory loss due to the passage of time," Carsner nevertheless argues that what she said to O'Hara became unknown to her because she forgot about it. *See* (Appellant's brief at 23-24).

The case law in Texas addressing whether forgotten evidence can become unknown to a defendant is sparse, but Texas courts have consistently rejected such a claim. *See*, *e.g.*, *Cato v. State*, 534 S.W.2d 135, 139-40 (Tex.Crim.App. 1976) (holding that the trial court properly denied appellant's new-trial motion despite appellant's claim that after trial, he remembered things about the offense that he had been unable to remember during trial); *Brown v. State*, 150 Tex.Crim. 285, 201 S.W.2d 50, 292 (Tex.Crim.App. 1946) ("Appellant's excuse for not having such witnesses present at the trial is that he did not remember having seen them until the matter was called to his attention by one of the witnesses, although he

was bound to know of his own whereabouts on the afternoon and evening of the time mentioned by the officers and of his arrest."); *McCullom v. State*, 112 Tex.Crim. 317, 16 S.W.2d 1087, 1089 (Tex.Crim.App. 1929) (rejecting the appellant's claim that witness testimony concerning where he spent the night on the date of the offense was evidence "discovered" after trial, notwithstanding his assertion that he had forgotten where he stayed, because "[a]ll of these facts were within appellant's knowledge before he was tried"); *Cornell v. State*, No. 02-10-00056-CR, 2011 WL 856910 at *3 (Tex.App.–Fort Worth, Mar. 10, 2001, no pet.) (mem. op.) (not designated for publication) (holding that the complained-of court order was evidence known to appellant and not newly discovered where appellant testified that he had known about the court order at the time it was rendered, but had since forgotten it and had not known where it was located); *Higgens v. State*, No. 05-96-01918-CR, 1998 WL 129004 at *1 (Tex.App.–Dallas, Mar. 23, 1998, pet. ref'd) (not designated for publication) (holding that the trial court could properly rule on the appellant's new-trial motion without an evidentiary hearing because "[a]ppellant's newly-found, post-trial recollection of his whereabouts cannot be considered newly discovered evidence").

Other jurisdictions addressing this issue have also universally rejected the argument that evidence once known to a defendant becomes unknown simply

because the defendant just forgot about it at the time of trial. *See*, *e.g.*, *Lee v. Murphy*, 41 F.3d 311, 315 (7th Cir. 1994) (holding, on appeal from the denial of federal habeas relief, that statements the defendant made to three witnesses after the shooting tending to exculpate him of the intent to kill were not newly discovered since "[t]he statements were allegedly made by [the defendant] himself and, as the state appellate court put it, 'he should remember what he said'"); *United States v. Wapnick*, 202 F.Supp. 716, 718 (E.D.N.Y. 1962) (holding that the revival of a defendant's memory regarding matters that would contradict the government's rebuttal witness was not newly discovered evidence); *Commonwealth v. Duest*, 572 N.E.2d 572, 575 (Mass.App.Ct. 1991) (holding that "...facts or evidence not introduced or otherwise made use of at trial because they were forgotten until after the trial do not constitute newly discovered evidence because of which a new trial may be granted"); *State v. Daymus*, 380 P.2d 996, 997 (Ariz. 1963) (holding that "[i]nformation within the personal knowledge of defendant does not become newly discovered evidence by reason of later recollection...at least where there is no showing of lack of negligence or diligence") (internal citations omitted); *cf. People v. Moore*, ---N.E.3d---, No. 3-16-0271, 2018 WL 5784486 at *5 (Ill.App.Ct., Nov. 5, 2018) (not yet reported) (holding, in the context of an actual-innocence claim on state habeas, that the

defendant's post-trial recovered memory of the events leading up to his wife's death did not constitute unknown and newly discovered evidence under the law); *Malaspina v. Itts*, 223 A.2d 54, 56 (Conn.Cir.Ct. 1966) (holding, in a paternity action, that the trial court erred in determining that evidence of the plaintiff's whereabouts on the date in question was newly discovered since "[s]uch evidence is not, as a matter of law, newly discovered," and further explaining that "[f]orgotten facts do not constitute newly discovered evidence, and the want of recollection of a fact, which by due diligence and attention might have been remembered, is not ground for a new trial").

In *People v. Moore*, an Illinois court of appeals explained that even if forgotten facts could be likened to facts not previously known, granting a new trial on the basis of a defendant's testimony that she has forgotten material parts of her evidence should be forbidden as being inconsistent with the notion that motions for new trial should be reviewed with the closest scrutiny and greatest caution:

> It would be a dangerous rule to grant a new trial upon an *ex parte* statement that certain material facts which had previously been known had been forgotten. It may be that in a sense a forgotten fact is practically the same as if it had never been known, but the liability to fraud and the temptation to perjury in such cases forbid that a new trial should be granted because the party against whom a verdict has gone makes oath that he has forgotten material parts of his evidence. In order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, applications for new

> trial on account of newly discovered evidence should always be subjected to the closest scrutiny by the court. The rules of law which govern in such cases, if carefully observed, will generally accomplish justice. There is, of course, a bare possibility that a rigid adherence to these rules may in exceptional cases work an injustice; but this is unavoidable. Neither the law nor the means of enforcing it are infallible, nor are the methods appointed by the law for the discovery of truth and the detection of error immune from mistakes; but it is far better that a single person should suffer mischief than that the rules be so relaxed that every litigant will have it within his power, by keeping back part of his evidence and then swearing that it was forgotten, to destroy a verdict and obtain a new trial at his pleasure. *See Moore*, 2018 WL 5784486 at *4, *quoting People v. Williams*, 89 N.E. 1030, 1033 (Ill. 1909).

Again, Carsner cannot dispute that she knew about her own statements when she allegedly uttered them to O'Hara before her trial. She has cited no authority that supports her contention that if she just forgot about her own statements made before trial, those statements could be transformed into evidence she "discovered" for the very first time after trial. The foregoing cases have refused to find evidence to which a defendant was privy before trial to be newly discovered to that defendant after trial if the defendant merely claimed to have forgotten about it. And it matters not whether Carsner herself or O'Hara remembered her statements because, by its very nature, statements made by Carsner before trial cannot be "discovered" for the first time by her after trial. *See Duest*, 572 N.E.2d at 575 ("[R]ecollection after a trial is concluded does not constitute newly discovered evidence because by its general nature it deals with

the known while discovery deals with the unknown."), *quoting State v. Sims*, 409 P.2d 17, 22 (Ariz. 1965). The real problem with Carsner's position is that because she presented no evidence that she suffered *permanent* memory loss, she could potentially remember the alleged outcry to O'Hara at any time, just as any person might suddenly recall that which they could not remember 5 minutes ago, in which case the evidence was never really unknown to her after all.

In her brief, Carsner further argues that "[t]here is no rule of law that the existence of evidence, once known but since forgotten, can never qualify as newly discovered unless the defendant's memory loss was due to a medical or psychological condition." *See* (Appellant's brief at 24).[10] If this Court were to recognize any kind of exception to the rule that forgotten evidence is not new

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[10] The State has not, as Carsner contends in her brief, taken the position that "...the existence of evidence once known but later forgotten due to amnesia or repression caused by a medically or psychologically verifiable event or condition is not known to the movant as a matter of law and will, if believed by the factfinder, support a motion for new trial." *See* (Appellant's brief at 6). In the past, the State has simply pointed out that, if such an exception were recognized, Carsner would be unable to avail herself of it because at no point did Carsner present evidence demonstrating that her failure to remember what she allegedly told O'Hara stemmed from any kind of medically (physical or mental) induced memory loss. *See* (State's PDR brief in cause number PD-0153-14 at 25-26). Carsner testified only that she did not remember making a sexual-abuse outcry to O'Hara. (RR12:63-65). And although Carsner now argues that her testimony that she just forgot about what she said to O'Hara was "...strongly probative of actual memory loss due to the passage of time," *see* (Appellant's brief at 23), she never even explained that that was why she could not remember the outcry, even though she was able to remember how she met O'Hara; how he dressed; that "...the situation with [O'Hara] was an experience for [her];" and that she "...had to explain to him why [she] couldn't" be "physical" with him. (RR12:63).

evidence, such exception should only be permitted in those situations where objective evidence demonstrates that a memory is truly lost and never to be regained, *i.e.*, memory loss due to some physical injury or psychological ailment that has essentially robbed that person of her memory, because, as stated above, a defendant who merely forgot the evidence could potentially again remember it at any time. And, as will be discussed below, courts have declined to extend such an exception to mere forgetfulness not caused by some physical or psychological ailment because "...forgetfulness is inconsistent with the diligence required in presenting the evidence during the trial...." *See State v. Hirsch*, 511 N.W.2d 69, 82 (Neb. 1994).

For all the foregoing reasons, the Eighth Court did not err in holding that O'Hara's testimony was not newly discovered evidence that was unknown to Carsner at the time of her trial and that Carsner's claimed excuse that she just forgot about what she herself said to O'Hara did not transform the complained-of evidence into new evidence. *See*, *e.g.*, *Cato*, 534 S.W.2d at 139-40; *Brown*, 201 S.W.2d at 292; *McCullom*, 16 S.W.2d at 1089; *see also*, *e.g.*, *Lee*, 41 F.3d at 315; *Duest*, 572 N.E.2d at 575. Carsner's first ground accepted for review should thus be overruled.

REPLY TO GROUND TWO: Merely forgetting about a potential witness does not excuse the lack of diligence in obtaining that witness's testimony. Consequently, Carsner failed to show that O'Hara's testimony could not have been found with the exercise of due diligence. Additionally, the denial of Carsner's new-trial motion, which is the ultimate ruling she challenges, should be upheld because, in light of all the evidence, O'Hara's testimony, even if true, was not sufficiently compelling to probably bring about a different result in a new trial.

UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

ARGUMENT AND AUTHORITIES

In her second ground accepted for review, Carsner suggests that whether the failure to obtain the complained-of new evidence resulted from her lack of diligence was likewise a credibility-based fact determination that was entitled to almost total deference on appeal. *See* (Appellant's brief at 23). Carsner further asserts that the Eighth Court thus erred in holding that Carsner's failure to recall the complained-of evidence exhibited a lack of diligence. *See* (Appellant's brief at vi, 23-24).

I. Standard of review

The same motion-for-new-trial standard of review set out in the State's reply to Carsner's first ground applies to this ground as well.

II. Carsner failed to show that O'Hara's testimony could not have been found with the exercise of due diligence.

At the outset, although Carsner suggests in her brief that the question of whether the evidence could have been found with the exercise of diligence was a credibility-based fact determination that was entitled to almost total deference on appeal, *see* (Appellant's brief at 23–where Carsner argues that because the testimony of Carsner and trial counsel were found to be true by the trial court, it should have been accepted as true by the Eighth Court), this Court appears to treat the issue as a mixed question of law and fact that does not turn on an evaluation of credibility and demeanor. *See Drew*, 743 S.W.2d at 227-28 (holding there was a lack of diligence, not because a trial court so found, but because the defendant did not attempt to call the previously unavailable co-defendant outside the presence of the jury to determine whether he would claim the privilege against self-incrimination if called to testify at defendant's trial); *Etter*, 679 S.W.2d at 514-15 (same). That is, a reviewing court affords deference to the trial court's determinations of historical fact, *i.e.*, what the defendant told trial counsel about the matter, what efforts were undertaken by trial counsel, etc., but reviews *de novo*

the issue of whether the facts as found by the trial court show that the new evidence could not have been found with the exercise of diligence.[11]

In any case, courts, both in and out of this State, have refused to excuse a defendant's lack of diligence in presenting evidence once known to the defendant simply because she forgot about it. *See*, *e.g.*, *Ho v. State*, 171 S.W.3d 295, 307 (Tex.App.–Houston [14th Dist.] 2005, pet. ref'd) (finding lack of diligence in securing the testimony of an alibi witness, notwithstanding the defendant's claimed excuse that he did not remember that the witness could be an alibi witness until after trial); *Morant v. State*, 802 A.2d 93, 103 (Conn.App.Ct. 2002) (holding that information about the defendant himself that, prior to trial, he had personal knowledge of from his own experience and activities was not newly discovered evidence and that his failure to remember that he was with the three proffered witnesses on the date of the offense demonstrated a lack of diligence because "[f]orgotten facts do not constitute newly discovered evidence, and the want of recollection of a fact, which by due diligence and attention might have been remembered, is not ground for a new trial"), *overruled on other grounds by Shabazz v. State*, 792 A.2d 797 (Conn. 2002); *Hirsch*, 511 N.W.2d at 82 (holding

[11] If such an issue is purely a question of fact, a trial court's finding that O'Hara's testimony could not have been found with the exercise of diligence is unsupported by the record and thus entitled to no deference on appeal.

that the defendant failed to exercise diligence in securing a videotape of Christmas festivities he claimed would show that the child-victim was comfortable around him and thus not truthful in her sexual-abuse allegations, despite his claim that he did not know the tape still existed and had forgotten about the tape); *Duest*, 572 N.E.2d at 575; *Daymus*, 380 P.2d at 997.

And courts have refused to excuse the lack of diligence under such circumstances because "...forgetfulness is inconsistent with the diligence required in presenting the evidence during the trial, and such lack of due diligence does not warrant a new trial on the basis of newly discovered evidence." *See Hirsch*, 511 N.W.2d at 82. "[I]f courts should grant litigants new trials in order to enable them to produce evidence which they had forgotten exists, there would be few final judgments." *See id*.; *see also Moore*, 2018 WL 5784486 at *4.

The rationale of the foregoing cases comports with the recognition in this State that the trial is "the main event" and not a practice run to see what evidence will resonate with the jurors. *See Ex parte Brown*, 205 S.W.3d 538, 545-46 (Tex.Crim.App. 2006). In other words, allowing a defendant to obtain a new trial simply based on her own unsubstantiated and self-serving declaration that she forgot about allegedly important evidence would:

> ...detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens....

See Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977).

As discussed in the State's reply to Carsner's first ground, Carsner's claimed excuse that she forgot about her statements to O'Hara did not transform that once-known evidence into something that was unknown to her. Carsner's failure to compel the attendance of a witness with allegedly relevant information once known to her demonstrates a lack of diligence. *See*, *e.g.*, *Ho*, 171 S.W.3d at 307; *Villarreal*, 79 S.W.3d at 814 (where the appellant knows of a witness and fails to inform his attorney of the existence of the witness, the trial court does not err by overruling a motion for new trial based on newly discovered evidence); *Zamora v. State*, 647 S.W.2d 90, 95 (Tex.App.–San Antonio 1983, no pet.) (holding that the defendant's failure to inform his attorney about a known witness demonstrated a lack of diligence); *see also Morant*, 802 A.2d at 103; *Hirsch*, 511

N.W.2d at 82; *cf. Drew*, 743 S.W.2d at 227-28, 228 n.17 (noting that "[d]ue diligence requires that a defendant cause subpoenas to issue for witnesses whom he knows to be conversant with the facts" and that "...the court usually will refuse to grant a new trial in order to admit the testimony of a witness who claims to have been with the defendant at the time of the commission of the alleged crime"); *Etter*, 679 S.W.2d at 514-15.

But even if Carsner can demonstrate that her specific statements to O'Hara were unknown to her because she forgot, Carsner still failed to show that the new evidence could not have been found with reasonable diligence because the State presented evidence tending to show that Carsner had confided her alleged childhood sexual abuse to friends, family members, and romantic partners, and the fact that she had confided in individuals such as Mayham and Ponce about her childhood abuse should have placed the defense on notice that she might have shared such details with other individuals with whom she had shared similarly close relationships. (RR12:175-79). According to Carsner, she and O'Hara had dated around the time she was allegedly abused by Javier; she remembered O'Hara well; and O'Hara was an individual with whom she had discussed her inability to be "physical" with him. (RR12:63-65, 70-71); *see also* (RR12:9-17, 34-40, 44-45, 47-49).

That Carsner had confided such details with individuals with whom she had shared some kind of close relationship should have put the defense on notice to interview such individuals. Carsner's failure to advise trial counsel of O'Hara's existence as a potential witness (due to his status as someone who shared a similarly close and/or intimate relationship with Carsner as did Mayham and Ponce), even though trial counsel questioned her about the existence of such potential witnesses, demonstrated a lack of diligence, even if she could not recall the specific statements she made to him. *See Fuqua v. State*, 457 S.W.2d 571, 572 (Tex.Crim.App. 1970) (holding that a defendant may not secure a new trial by failing to call a witness whose identity is known and whose knowledge of the case might have been known prior to trial in the exercise of reasonable diligence); *Shafer v. State*, 82 S.W.3d 553, 556 (Tex.App.–San Antonio 2002, pet. ref'd) (holding that it was the defendant's duty to seek out and interview any material witnesses, including the members of his own family, and that the defendant failed to exercise due diligence in trying to discover letters written by the sexual-assault complainant to the defendant's daughter that indicated that the complainant had once had consensual sex with a boyfriend where the defendant knew that the complainant and his daughter regularly corresponded and might discuss their sexual experiences, and it would have been logical for the defendant, his attorney,

or his investigators to interview his daughter, which was not done); *Morant*, 802 A.2d at 103 (holding that when a defendant seeks a new trial for newly discovered evidence, he must have been diligent in his efforts to fully prepare his cause for trial; that a new trial will not be granted if the new evidence relied upon *could have been known* with reasonable diligence; and that once the defendant knew the date of the offense, it was incumbent on him to determine whether there were witnesses who could testify as to his whereabouts on that day).

For all the foregoing reasons, Carsner failed to show that O'Hara's testimony could not have been found with the exercise of diligence, and her second ground accepted for review should be overruled.

III. Carsner failed to show that O'Hara's testimony, even if true, was sufficiently compelling to probably bring about a different result in a new trial.[12]

Even if this Court determines that Carsner satisfied the first two *Keeter* prongs, the denial of Carsner's new-trial motion, which is the ultimate ruling she challenges, should be upheld because, in light of all the evidence, O'Hara's

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[12] In her brief, Carsner argues that the only issues before this Court are the first two prongs of the newly-discovered-evidence test because the State was entitled to refile, but did not, its PDR challenging the Eighth Court's analysis and resolution of the fourth prong in its initial decision. *See* (Appellant's brief at 8), *see also Carsner*, 415 S.W.3d at 513-14. However, this Court vacated the Eighth Court's decision and judgment finding error in the trial court below, *see Carsner*, 444 S.W.3d at 1, 4, such that the Eighth Court's previous analysis of the fourth prong in its initial opinion is not now before this Court.

testimony, even if accepted as true, was not compelling enough to probably bring about a different result in a new trial. *See*, *e.g.*, *Wallace*, 106 S.W.3d at 108.[13]

In this case, there was overwhelming evidence proving that Carsner intentionally and knowingly caused her parents' deaths, and Carsner did not challenge the sufficiency of the evidence on appeal. The evidence at trial showed that the day before the murders, Carsner, upset and frustrated, told her friend Sprowso that Irma had been awarded custody of A.C., even though that was not true. (RR5:151-52, 165); (RR6:57-60); (RR7:70-73, 106-07).[14] The next morning, Carsner completed the purchase of a handgun and stopped in a desert area for target practice. (RR4:72-77); (RR7:77). When Carsner arrived at the Quirozes' home, she parked two houses down, despite ample parking space in front of their home, and walked, unannounced, through a side gate and into their backyard where they were barbequing for their grandchildren. (RR3:30-35, 53-56); (RR5:62-65, 98-101); (RR9:49-51).

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[13] Through cross-examination of O'Hara and Carsner, the testimony of Ponce and Mayham, and its argument at the new-trial hearing, the State contested the issue of whether O'Hara's testimony, as it related to the identity of the alleged abuser, was probably true. (RR12:181-82–where the prosecutor argued that "...it is probably likely that Mr. O'Hara is incorrect..."). Additionally, O'Hara was unable to recall the relevant time frame in which Carsner said she was abused.

[14] The State's theory as to Carsner's possible motive was that Carsner was angry at and hated her parents for reporting her to CPS. (RR10:107).

Dressed all in black, hiding her hands behind her back, and wearing an "evil grin," Carsner advanced on her parents, and, as the children began to flee and Irma begged for her life, Carsner, without saying a word, opened fire on her parents. (RR5:65-72, 81-83, 92-93, 100-02, 115-17); (RR9:51-54). Carsner shot her parents 12 times, shooting Javier four times, with one gunshot wound to his back from a distance of two inches, and Irma eight times, with one gunshot wound to her head from a distance of eight to ten inches. (RR5:25-27, 41-43).

Carsner then fled the scene, and contrary to what she has asserted as her reason for going to her parents' home, specifically, to get A.C., she drove in the opposite direction of where A.C. would likely have run. (RR5:86-89); (RR7:81-83). Calling her friend Sprowso after the murders, Carsner told her that she did not want Irma to have custody of A.C. because "...it was a very bad place for her daughter to go but the Judge wasn't hearing that, and so she was going to eliminate the situation...." (RR5:133-36).

Additionally, the State presented considerable evidence refuting Carsner's claim that Javier had sexually abused her or that she harbored any reasonable fear that he would abuse A.C., specifically, evidence that Carsner had previously left A.C. in her parents' unsupervised care, (RR5:161-62); (RR7:107-08, 127); (RR9:46-48); that until her parents reported her to CPS, Carsner had a loving

relationship with Javier, (RR7:137-42, 145-50); (SX148-158); that Javier never touched A.C. inappropriately, (RR9:48); and that Carsner was generally not a truthful person. (RR9:33-34, 59).

The State also presented evidence showing that Carsner, particularly when angered, would falsely accuse, or threaten to falsely accuse, individuals of sexually abusing her or A.C. in an attempt to exact revenge, to manipulate people, or to gain a tactical advantage in any given situation, including legal proceedings. As discussed above, the record reflects that Carsner had previously lodged unfounded sexual-abuse complaints, or threatened such complaints, against numerous individuals, including family members, former romantic partners, and the twelve-year-old son of one of A.C.'s foster families. (RR7:110-11, 127-35); (RR9:22-28, 34); (SX144 at 56-57); (SX147, 160). And had O'Hara been called by Carsner at trial, his testimony, in which he was already unable to identify whether Carsner identified Javier or her grandfather as the alleged abuser and when the abuse allegedly occurred, would have been seriously undermined by the State's rebuttal witnesses, who would have testified that Carsner had told them the same hamburger-meat story, but identified someone other than Javier as the perpetrator, and that she had been happy when Javier joined their family because it

ended the abuse by this other person. (RR12:124-27, 129-30, 141-43, 146-47, 150-52).

Carsner's most disturbing attempt to lend credence to her alleged concerns about A.C.'s safety involves her exploitation of an unfounded allegation that A.C. was "raped" by a cousin in the Quirozes' home. Carsner relied on this alleged "rape" to justify her concern over A.C.'s safety, when Carsner knew all along that this alleged sexual abuse had been nothing more than two very young children getting a little out of control during playtime, and Carsner herself acknowledged that A.C. had not in fact been raped by her then-four-year-old cousin J.Q. (RR6:145-46); (RR7:57-69); (SX142 at 153-54).

In light of the foregoing evidence demonstrating Carsner's premeditation and evidence tending to show that Carsner's accusation against Javier was yet another false complaint made for the purposes of gaining an advantage in legal proceedings, O'Hara's testimony, in which he was unable to specifically identify whether Carsner's alleged abuser was Javier or a grandfather and when the abuse allegedly occurred, was not compelling enough to probably bring about a different result in a new trial. *See*, *e.g.*, *Wallace*, 106 S.W.3d at 108 (holding that where the State's case was strong, the trial court could have reasonably concluded that the strength of the State's case was such that the new evidence, even if true, was not

compelling enough to probably bring about a different result in a new trial); *cf. Soulas v. State*, Nos. 13-99-002-CR, 13-99-003-CR, 2005 WL 1414247 at *5 (Tex.App.–Corpus Christi, June 16, 2005, pet. ref'd) (mem. op.) (not designated for publication) (holding that the trial court could have reasonably concluded that the new evidence was not demonstrably true, given that the newly discovered witness could not remember certain details that would have been important to the case).

In her brief, Carsner suggests that O'Hara's testimony would have brought a different result in a new trial because her defense had been that her actions had been motivated by concern for A.C., and if Carsner's assertion that Javier had abused her (Carsner) had been corroborated by O'Hara's testimony, then "...her concern was well-founded, and would likely have impaired her judgment as a mother to the point that she acted irrationally, particularly in light of the emotional and psychological disabilities she had suffered throughout her life as a result of his abuse." *See* (Appellant's brief at 2-3). Carsner's argument fails because Texas does not recognize a diminished-capacity defense, *see Ruffin v. State*, 270 S.W.3d 586, 591 (Tex.Crim.App. 2008); *Jackson v. State*, 160 S.W.3d 568, 573 (Tex.Crim.App. 2005); a defendant is not entitled to pursue jury nullification by appealing to the jury's sympathy, *see Lumsden v. State*, ---S.W.3d---, No. 02-16-

00366-CR, 2018 WL 5832112 at *30 (Tex.App.–Fort Worth, Nov. 8, 2018, pet. ref'd) (not yet reported); and the existence of what Carsner perceived to be good, but irrational, intentions during the murder of her parents did not serve to negate her culpable mental state in committing what the law presumes, under the circumstances in this case, to be an intentional and knowing murder, particularly in the absence of affirmative evidence that any mental defect or illness prevented her from forming the requisite mental intent for an intentional and knowing murder. *See*, *e.g.*, *Mays v. State*, 318 S.W.3d 368, 380-82 (Tex.Crim.App. 2010), *cert. denied*, 131 S.Ct. 1606, 179 L.Ed.2d 506 (2011); *Jackson*, 160 S.W.3d at 572-73; *Zorn v. State*, 315 S.W.3d 616, 625 (Tex.App.–Tyler 2010, no pet.).

The most problematic issue for Carsner is that she shot her parents 12 times, some at close range. Even if the jury had credited Carsner's testimony that she had not formed the intent to kill her parents when she initially went to her parents' home and into their backyard, and even if the jury had given her the benefit of the doubt and believed that she had not formed the intent when she fired her first shot, she surely intended to, or knew that she was reasonably certain to, cause the death of her parents when she shot them an additional 11 times. *See*, *e.g.*, *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex.Crim.App. 2012) ("Pulling out a gun, pointing it at someone, pulling the trigger twice, fleeing the scene (and the country), and later

telling a friend 'I didn't mean to shoot anyone' does not rationally support an inference that Appellant acted recklessly at the moment he fired the shots."); *Ex parte Thompson*, 179 S.W.3d 549, 556 n.18 (Tex.Crim.App. 2005) ("It is both a common-sense inference and an appellate presumption that a person intends the natural consequences of his acts...and that the act of pointing a loaded gun at someone and shooting it at close range demonstrates an intent to kill.") (citations omitted); *Wesbrook v. State*, 29 S.W.3d 103, 113-14 (Tex.Crim.App. 2000), *cert. denied*, 532 U.S. 944, 121 S.Ct. 1407, 149 L.Ed.2d 349 (2001); *Sholars v. State*, 312 S.W.3d 694, 703 (Tex.App.–Houston [1st Dist.] 2009, pet. ref'd) ("When a deadly weapon is fired at close range, and death results, the law presumes an intent to kill."), *cert. denied*, 131 S.Ct. 156, 178 L.Ed.2d 94 (2010). In the absence of insanity, a recognized justification defense, or the retroactive recognition of diminished capacity as a valid justification defense, Carsner's conduct in shooting her parents constitutes nothing less than intentional and knowing murder, and corroboration of her alternative motive for her actions does not diminish that.

For the foregoing reasons, the denial of Carsner's new-trial motion, which is the ultimate ruling she challenges, should be upheld because, in light of all the evidence, O'Hara's testimony, even if accepted as true, was not compelling enough to probably bring about a different result in a new trial. *See Wallace*, 106

S.W.3d at 108 (holding that a trial court may properly deny a new-trial motion when the State's case is strong enough that the new evidence, even if true, would not be compelling enough to probably bring about a different result in a new trial).

PRAYER

WHEREFORE, the State prays that this Court overrule Carsner's grounds presented for review and affirm the judgment of the Eighth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 11,035 words.

/s/ Lily Stroud
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on February 15, 2019, a copy of the foregoing brief was emailed, through an electronic-filing-service provider, to appellant's attorney: Robin Norris, robinnorris@outlook.com; and to the State Prosecuting Attorney, information@SPA.texas.gov.

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